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STATUTES CITED

Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087:	
S. 33 (as amended by the Act of Aug. 23, 1916, c. 399, 39 Stat. 532)	4, 6, 7
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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 25, ORIGINAL

EX PARTE: IN THE MATTER OF THE STATE OF MARYLAND

CASE "C"

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR RESPONDENTS IN SUPPORT OF RETURN TO THE RULE

GROUNDS OF JURISDICTION

This case, like Nos. 23 and 24, Original, is a petition by the State of Maryland for a writ of mandamus to the District Court for the District of Maryland. The jurisdiction of this Court is invoked under Section 234 of the Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1156).

On October 12th, 1925, this Court granted a rule to show cause why a peremptory writ should not issue. The rule was made returnable on or before November 16th, 1925.

STATEMENT

The purpose of the petition is to compel the District Court to remand to the Circuit Court of the State for Harford County an indictment charging E. Franklin Ely, a Federal Prohibition Agent, with the crime of perjury. Ely is one of the five persons who are the objects of a prosecution for murder in Case "A" (Original No. 23) and who are also the objects of a prosecution for conspiracy to obstruct justice in Case " B " (Original No. 24). Most of the facts in the present case have been already set forth in the respondents' briefs, in Cases "A" and "B." For convenience, they will be briefly repeated here.

The defendant, Ely, was a duly appointed Federal Prohibition Officer. His commission empowered him—

> "to act under the authority of and to enforce the National Prohibition Act and Acts supplemental thereto *and all Internal Revenue Laws, relating to the manufacture, sale, transportation, control, and taxation of intoxicating liquors*" * * * and to execute and perform all the duties delegated to such officers by law." (Exhibit A to Petition of the State of Maryland, pp. 40-41.)

On November 19, 1924, the defendant, Ely, and three other Prohibition Officers, together with their chauffeur, Trabing, were ordered by the Federal Prohibition Director for Maryland to investi-

gate the alleged unlawful distilling of liquor on an unoccupied farm near the village of Madonna, Maryland. They went there by motor, arriving shortly after noon, and discovered in a secluded valley the materials for illicit distilling. They hid themselves in the woods. Soon afterwards a number of men came up, carrying a still. When the officers made their presence known the men dropped the still and fled. The officers pursued, but failed to arrest anyone. They thereupon returned to the still, destroyed the materials, and proceeded back to their car to return to Baltimore and report the affair to their superior. On their way to the car, about 400 or 500 yards from the site of the still, they found a man (Wenger) lying mortally wounded. They picked him up and took him in their car to Jarrettsville, and thence to Bel Air, in search of a doctor. By the time one was found, the man was dead. The officers then at once reported the matter to the State's Attorney in Bel Air. Upon learning that his informants were Prohibition Officers, the State's Attorney at once ordered all five to be placed under arrest. They were confined in the local jail that night; and the next day they gave further information to the State officials and to the Coroner's Jury. The charge of perjury which gives rise to the present case was predicated upon the statement made by the defendent, Ely, before the Coroner's Jury that

he *had not seen Wenger* at the time when Ely and the other officers lay hidden watching the still. The indictment for perjury is set forth in full in the amended petition of Ely for removal of his cause to the Federal Court. (Exhibit A to petition of the State of Maryland, at pp. 26–28.)

On the evening of November 20th Ely, together with his companions, was released on bail at the instance of the United States Attorney. In February, 1925, the indictment for perjury against Ely was returned by the grand jury of the State to the Circuit Court for Harford County. The defendant petitioned for removal of the cause, under Section 33 of the Judicial Code. Removal was granted. Subsequently, the State of Maryland moved to quash the order of removal and to remand the prosecution to the State Court. After argument upon this motion, leave was granted to amend the petition for removal. The petition was accordingly amended to set forth in greater detail all the circumstances surrounding the indictment. Proper allegations were included, stating that the defendant was a Federal officer, and that at the time when the alleged perjury was committed, he had been in the discharge of his duties—

> "as a Federal Prohibition Officer, and in making and attempting to make an investigation concerning a violation of the National Prohibition Act and other Internal Revenue

> Laws, and in reporting the results of said investigation concerning a violation of the National Prohibition Act and other Internal Revenue Laws, and in protecting himself and his fellow officers of the Internal Revenue in the discharge of his and their duty.

It was also alleged that the defendant and his associates had been called before the Coroner's Inquest as set forth and had—

> without reservation in accordance with their duty as investigating and reporting officers of the Federal Government and acting under the direction of the Maryland Federal Prohibition Director, related the facts aforementioned.

The defendant did not, however, admit that he had committed any perjury. The petition ended by alleging that the indictment for perjury was—

> a criminal prosecution on account of acts alleged to have been done by your petitioner at a time when he was engaged in the performance of his duties as a Federal Prohibition Officer.

Upon this amended petition removal was granted. The State of Maryland again moved to quash the order of removal and to remand the cause. Its motion was denied. To compel the District Court to remand the cause, the State has now petitioned for a writ of mandamus from this Court.

ARGUMENT

SUMMARY

I. The Prosecution for Perjury Was Properly Removable, Notwithstanding That the Defendant Did Not Admit the Charge.

II. The Decision of the District Court Granting the Petition for Removal, and Denying the Motion to Remand, Was an Exercise of Lawful Judicial Discretion, and Can Not Be Controlled by Mandamus.

I

The Prosecution for Perjury Was Properly Removable, Notwithstanding That the Defendant Did Not Admit the Charge.

Points I and II of the respondents' brief in Case "A" (No. 23 Original) dealt with the application of Section 33 of the Judicial Code and Section 28 of the National Prohibition Act to prosecutions against Federal Prohibition Agents. Point I of the respondents' brief in Case "B" (No. 24 Original) dealt with the necessity for an admission of the act charged as a prerequisite to the right of removal. It is unnecessary here to repeat those arguments at length. It is submitted that there is no necessity for any such admission of guilt.

Tennesse v. *Davis*, 100 U. S. 257.
Alabama v. *Peak*, 252 Fed. 306.
Oregon v. *Wood*, 268 Fed. 975.

In the case now under consideration it is submitted that to require such an admission would be altogether unreasonable. If the accused officer in this case were required to incriminate himself by admitting that he had committed perjury, before

he could claim the right of removal, the subsequent proceedings would be a farce. His guilt would be established by his own sworn statment, and there would be nothing left for any Court, Federal or State, to try. It is submitted that Section 33 of the Judicial Code contains nothing which requires such an admission.

With respect to the proper interpretation of Section 33, and in particular with respect to the phrases "color of office" and "color of law", reference is made to the respondents' brief in Case "B," at pages 12–15.

It is of course true, as the State of Maryland urges, that the Internal Revenue laws do not require Federal officers to commit perjury. But the accused officer in this case does not admit that he committed perjury. He is not seeking to be freed of liability under the charge. He seeks only to have his guilt or innocence determined in the Federal Court.

It is also true that perjury may be regarded as "peculiarly an offense against the courts of a particular sovereign;" and it is urged that it should be triable only by that sovereign. The same reasoning certainly applies to the case of contempt of court, and to the case of murder, which this Court has declared to be governed by "the most unquestionable and most universally applicable of State laws." *Johnson* v. *Maryland,* 254 U. S. 51. Yet Federal officers accused of murder and of contempt of State courts have in numberless cases

been granted aid, either by removal or by discharge on habeas corpus, by the Federal courts.

Boske v. *Comingore,* 177 U. S. 459.
Tennessee v. *Davis,* 100 U. S. 257.
Massachusetts v. *Bogan,* 285 Fed. 668.

At the time this alleged perjury was committed, the accused was still a Federal officer, and had come, shortly before, from the performance of his duty in destroying an illicit still. When he had given his information to the State's Attorney, and had informed the State's Attorney that he was a Federal officer, he had at once been placed in custody. He remained in custody until and during the hearing before the Coroner. In his petition for removal, proper allegations were made as to his official capacity. It is submitted that the charges of murder (Case A), of conspiracy (Case B), and of perjury (Case C), are so closely inter-related that they can not be separated. The charges in Case B and Case C arose directly out of the charge of murder in Case A. It is submitted that all three must be considered together, and that all three are properly removable to the Federal court.

II

The Decision of the District Court Granting the Petition for Removal, and Denying the Motion to Remand, was an Exercise of Lawful Judicial Discretion, and can not be Controlled by Mandamus.

Argument in support of this proposition has already been given at length under Point II of the respondents' brief in Case "B," at pages 15–19. It

will be necessary here to give only a brief additional mention of the facts in this case.

The petition of the accused officer for removal included, of course, full allegations of the facts upon which the right to removal was based. *The motion to remand, interposed by the State of Maryland, directly traversed these allegations.* Among the grounds assigned for that motion were these (Exhibit A to petition for mandamus, at pages 35–37):

> (1) Because the allegations of the second paragraph of the amended petition are untrue. (This paragraph contained an allegation that the petitioner was a Federal Prohibition Officer of the Bureau of Internal Revenue, acting to enforce the National Prohibition Act and the Internal Revenue Laws relating to the manufacture, etc., of intoxicating liquor.)
>
> (3) Because the allegations set forth in said petition are contradictory, evasive, founded on hearsay, and in part untrue.
>
> (10) And for other good and sufficient reasons to be shown at the hearing.

It is very clear, therefore, that by the petition for removal and by the motion of the State to remand, issues both of law and fact (or issues of mixed law and fact) were raised. It is submitted that the decision of these issues of law and *fact* rested with the District Court alone. The petition for removal was duly verified under oath and was signed by the petitioner. The District Court was entitled to treat it as *evidence* of the facts therein

contained. It is submitted that the District Court was at liberty to believe or to disbelieve that evidence in its own discretion, and according to its belief or disbelief, to deny or to grant the motion of the State to remand the cause. It is submitted that the writ of mandamus can not be used to control the lower court's discretion in deciding upon the issues thus presented. In passing upon the claim of the accused officer for removal, the District Court was acting within its lawful jurisdiction. That Court alone had authority to decide the issues presented. If it has erred, it has erred only in discretion. Such an error, if it exists, cannot be corrected by mandamus.

Ex Parte Muir, 254 U. S. 522,
In re Cooper, 143 U. S. 472,
In re Rice, 155 U. S. 396, 403,
Tennessee v. *Davis,* 100 U. S. 257, 261,
And cases cited in respondents' brief in Case B, at pages 15–19.

CONCLUSION

It is therefore respectfully submitted that the rule should be discharged, and that the petition for a writ of mandamus should be denied.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General,
Of Counsel for the Respondents.

NOVEMBER, 1925.

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